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2 **UNITED STATES DISTRICT COURT**
3 **DISTRICT OF NEVADA**

4 James Sharkey,
5 Petitioner,
6 v.
7 Brian Williams,
8 Respondent.

Case No.: 2:20-cv-00253-KJD-DJA

Order

9
10 This is a habeas corpus case under 28 U.S.C. § 2254. In accordance with the court's
11 February 7, 2020, order (ECF No. 3), petitioner has paid the filing fee. Thus, the habeas petition
12 is before the court for initial review under Rule 4 of the Rules Governing Section 2254 Cases.

13 The petition purports to challenge a conviction on a charge of domestic violence, for
14 which petitioner received a sentence of 2 to 5 years. The judgment of conviction was entered on
15 March 20, 2018. Petitioner's conviction was affirmed by the Nevada Court of Appeals on March
16 18, 2019.¹ The petition asserts twelve grounds for habeas corpus relief, almost all of which
17 alleged a deprivation of petitioner's constitutional right to effective assistance of counsel.

18 In reviewing the petition in this case and online records for the Nevada Supreme Court, it
19 appears as if petitioner still has not completed state court exhaustion with respect to any of his
20 claims. A federal court may not grant habeas corpus relief on a claim not exhausted in state
21 court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state
22 comity, and is intended to allow state courts the initial opportunity to correct constitutional
23

¹ <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=54313>

1 deprivations. *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must
2 fairly present the claim to the highest available state court, and must give that court the
3 opportunity to address and resolve it. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam);
4 *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).

5 Instead of providing exhaustion information for each individual claim, petitioner
6 indicates in his petition that none of his claims were exhausted on direct appeal, but all of them
7 were presented to the “appellate courts” in his state post-conviction proceeding. ECF No. 1-1 at
8 3. However, a review of the online records for the Nevada appellate courts indicates that his
9 post-conviction appeal relative to the conviction he seeks to challenge herein was voluntarily
10 dismissed.² Moreover, the court questions whether petitioner could have fully-litigated his post-
11 conviction claims in state district court and the Nevada appellate courts given that his direct
12 appeal was decided less than a year ago.³

13 The court will grant petitioner an opportunity to show cause why this action should not
14 be dismissed on account of his failure to exhaust any of his claims in state court. If petitioner
15 fails, within the time allowed, to make a prima facie showing that he has exhausted, in state
16 court, one or more of the claims he asserts, this case will be dismissed. *See Rose v. Lundy*, 455
17 U.S. 509 (1982). In the alternative, petitioner may request stay and abeyance as provided in
18 *Rhines v. Weber*, 544 U.S. 269 (2005). Under *Rhines*, a district court has discretion to stay a
19 mixed or wholly unexhausted petition to allow a petitioner time to present his or her unexhausted
20 claims to state courts. 544 U.S. at 276; *see Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016)

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22 ² <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=57844>
<http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=57843>

23 ³ In Nevada, claims of ineffective assistance of counsel are raised for the first time in a timely
first post-conviction petition. *Pellegrini v. State*, 34 P.3d 519, 534 (Nev. 2001)

1 (holding a district court has the discretion to stay and hold in abeyance fully unexhausted
2 petitions under the circumstances set forth in *Rhines*). This court will not grant a *Rhines* stay,
3 however, unless “the petitioner had good cause for his failure to exhaust, his unexhausted claims
4 are potentially meritorious, and there is no indication that the petitioner engaged in intentionally
5 dilatory litigation tactics.” *Rhines*, 544 U.S. at 278.

6 Also submitted with petitioner’s application to proceed *in forma pauperis* is a motion for
7 appointment of counsel. ECF No. 1-2. Given the current circumstances of this case, the court is
8 not persuaded that the “interests of justice” warrant the appointment of counsel. *See* 18 U.S.C.
9 §3006A(a)(2)(B) (giving the district court discretion to appoint counsel when it determines that
10 the “interests of justice” require representation). Thus the motion will be denied.

11 IT IS THEREFORE ORDERED that the Clerk shall separately file the habeas petition
12 and motion for appointment of counsel currently attached to petitioner’s application to proceed
13 *in forma pauperis*. ECF No. 1. The Clerk shall also add Aaron D. Ford, Attorney General of the
14 State of Nevada, as counsel for respondents, and electronically serve a copy of the petition and
15 this order upon the respondents.

16 IT IS FURTHER ORDERED that petitioner shall have 30 days from the date of entry of
17 this order to either (1) show cause why the court should not dismiss this action as unexhausted or
18 (2) file a motion for stay and abeyance. Failure to respond to this order within the time allowed,
19 or failure to make the required prima facie showing, will result in the dismissal of this action. If
20 petitioner maintains that any claims in the petition have been exhausted, petitioner shall attach
21 with his response copies of any and all papers that were accepted for filing in the state courts that
22 he contends demonstrate that the claims are exhausted. All factual assertions must be specific
23 and supported by competent evidence.

1 No extension of time will be granted to respond to this order except in the most
2 compelling of circumstances.

3 IT IS FURTHER ORDERED that the respondents' counsel shall enter a notice of
4 appearance within 20 days of the entry of this order, but need take no further action in the case
5 unless and until the court so orders.

6 IT IS FURTHER ORDERED that petitioner's motion for appointment of counsel is
7 DENIED.

8 Dated: March 6, 2020



U.S. District Judge Kent J. Dawson